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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MARK BROWNE, Plaintiff and Respondent, v. ASSURED AGGREGATES COMPANY, INC., et al. Defendants and Appellants.	H024312 (Santa Clara County Super. Ct. No. CV139577)

Plaintiff Mark Browne filed this lawsuit seeking damages for personal injuries after the van he was driving was crushed by an 8,500 pound cement drain pipe that had fallen off a trailer being driven in the opposite direction by defendant James Wyatt for his employer, defendant Assured Aggregates, Company, Inc. Three drain pipes had slipped off the trailer and onto the highway as the trailer rounded a curve. One of the moving pipes hit Browne's van.

After the first day of trial testimony, defendants admitted liability and Browne agreed to dismiss his claim for punitive damages. After five days of testimony, a jury awarded Browne $85,282 for past lost earnings, $701,719 for future lost earnings, $110,560 for future medical expenses, and $2,000,000 in noneconomic damages. The jury found that Browne's worker's compensation carrier, Liberty Mutual Insurance Company, had paid $329,273.94 as a result of this accident.

The trial court denied defendants' motion for new trial asserting improper argument by Browne's counsel and excessive noneconomic damages. On appeal defendants renew both these claims. For the reasons stated below, we will affirm the judgment.

TRIAL EVIDENCE

In view of the contentions on appeal, we focus on the trial evidence of Browne's pain, suffering, inconvenience, and emotional distress.

Browne was born on April 17, 1957. His van collided with the cement pipe on November 29, 1999. The collision caused him to lose consciousness. He regained consciousness inside the van. He was taken by ambulance and helicopter to San Jose Medical Center, where he spent eight days in intensive care. According to Browne, on the day of the accident he was not really aware of the pain of his injuries. He was released from the hospital on February 24, 2000. He has received further medical treatment since his release from the hospital.

A. The injuries

Browne called the following medical expert witnesses to testify at trial. Dr. Gary Zoellner is an orthopedic surgeon who performed three surgeries on Browne. Browne was also examined by Dr. Roger Mann, a surgeon who specializes in feet and ankles, Dr. Richard Johnson, a surgeon who specializes in hands and arms, and Dr. Vincent Hentz, a hand and arm surgeon trained by Dr. Johnson. Defendants called no medical experts.

The doctors explained that Browne's injuries consisted of bone fractures, nerve damage, and corresponding injuries to nearby soft tissue. Electromyograms revealed lack of sensation in the median nerves of both Browne's hands. The median nerve carries sensations from the thumb, index, and middle fingers, and the thumb side of the ring finger. Browne reported numbness and tingling in his right hand. There was evidence of damage to the distal branch of the radial nerve in his right hand, which carries sensation from the palm surface of the thumb and over the back of the thumb. There was a hairline fracture of the metacarpal bone at the base of his right thumb and compound, open

fractures of both bones, the radius and the ulna, in his right forearm. There has been muscle atrophy in Browne's right hand and arm.

According to Dr. Hentz, Browne did not sustain a direct injury to his hand, "[b]ut I suspect that the consequences of that crush injury to his arm led to the death of many of the small muscles that exist in the hand. Those muscles have bec[o]me scar tissue, basically."

X-rays of Browne's spine revealed a wedge fracture of his L5 vertebra and transverse process fractures of L1 and L2.

Browne suffered a number of injuries to his right leg: a fracture of the femoral neck that detached the ball joint (the femoral head) at the hip from the rest of the leg; a midshaft fracture of the right femur halfway between the hip and the knee; a fracture of the lateral femoral condyle, a part of the femur involved in the knee joint; a chip off the patella or kneecap; a torn lateral meniscus, which is cartridge in his knee joint; and comminuted fractures of the distal tibia and distal fibula, which extended into the joint space of his right ankle. A fracture involving the ankle joint is called a plafond fracture.

B. The surgeries

On the day of the accident, November 29, 1999, Dr. Zoellner performed the following surgeries. He reorganized the comminuted bones above the ankle, drilled holes in the bones, and screwed them to a stainless steel plate that was contoured to fit the bone. The same procedure was performed on the broken forearm bones. A rod was placed inside the right femur. The rod was screwed into place above the knee. Another screw into the femoral head reattached the bone to the ball joint.

Dr. Zoellner has performed two follow-up surgeries after November 29, 1999. A surgery on March 21, 2000, was done because Browne had a significant restriction on his range of motion. While Browne was sedated, Dr. Zoellner broke up scar tissue by manipulating his joints. According to Dr. Zoellner, "when any patient who has manipulation wakes up, suddenly their brain starts feeling discomfort and pain."

On January 23, 2001, Dr. Zoellner performed arthroscopy on Brown's right leg to excise a torn part of the lateral meniscus and to shave defects on the lateral femoral condyle and the bottom of the patella.

After the knee surgery, Dr. Zoellner referred Browne to Dr. Vincent LaPore, a hand surgeon who did not testify. Drs. Johnson, Hentz, and Zoellner testified about Browne's hand injuries and surgeries. Browne's right thumb had become a relatively immobile post due to a lot of scarring between his thumb and index finger. The scar tissue contracted and pulled his thumb into a dysfunctional position. LaPore's first surgery did not remove much scar tissue. Instead, he cut into the scar to release the contracture. LaPore took a skin graft from Browne's abdomen to cover the area. Because the first skin graft did not completely take, Dr. LaPore had to do a second skin graft.

C. Impact of the injuries

At the time of trial in December 2001, Browne still had significant physical limitations due to his injuries. The right hand surgeries allowed him to touch his fingers to his thumb. He cannot touch his thumb to his fingers. His thumb, index finger, and middle finger remain numb. Because of this reduced sensitivity, he watches what he touches so that he does not cut himself.

Browne's right hand was his dominant hand, so its grip strength should be about 10 percent more than his left hand. Instead, according to tests by Dr. Hentz, it was about one-quarter of the left hand grip strength. He is limited to carrying or lifting less than ten pounds with his right hand.

The normal pinch strength for an adult male is 20 to 25 pounds. Browne has virtually no pinch strength in his right hand. Dr. Hentz believed that further surgery could restore his pinch strength to about five pounds. Although Browne is able to drive an unmodified truck, he cannot turn the ignition key with his right thumb and forefinger. He cannot wipe himself in the bathroom with his right hand. He has to hold a toothbrush and a knife in a special way to use them. It is difficult for him to tie his shoes. He cannot

grab the rail with his right hand when descending stairs. Browne no longer plays tennis, golf, or the piano.

Browne also suffers from his other injuries. He exercises to strengthen his right leg. He walks about a mile a day and works out at a gym two or three times a week. Browne limps when he walks. After walking for a mile, his back starts throbbing. He needs to sit down and rest for 45 minutes to an hour before resuming walking. Though the doctors recommend exercise, the more Browne does, the more it hurts in his right knee, ankle, and hip. The knee pain is the worst. It is constant. In June 2001, Browne reported to Dr. Mann that he has a constant dull ache in his ankle with occasional sharp pains. His right ankle joint has one-third less up-and-down motion than his left ankle. He is careful to put his good foot forward in climbing stairs. Browne is supposed to wear an elastic compression stocking to help control the swelling of his ankle. It is difficult for him to grip the stocking and pull it on. His knee also swells. On cold mornings Browne's right leg feels tight, so he gets out of bed on his left leg. Browne takes Ibuprofen to help him sleep six hours a night.

Browne has two daughters whom he sees every other weekend. One is 14 years old, the other 9. Their favorite pastime is shopping. He can no longer accompany them as they walk around a mall. He has to sit and rest. They come find him when they want to buy something. His younger daughter is scared of his injured hand and will not let him touch her or hold her with his right arm. She would like him to cover the hand with a glove.

According to Dr. Mann, arthritis is the degeneration of cartilage in joints with resulting pain. The damage to Browne's knee and ankle will accelerate the progress of arthritis. A problem in treating Browne is that, while his ankle might benefit from immobilizing it, that puts more stress on his knee.

A vocational rehabilitation consultant for defendants, Gary Graham, agreed that Browne's injuries prevent him from returning to the service technician job he held at the time of the accident. After a variety of jobs as a dishwasher, cook, fish butcher, and restaurant manager, Browne had found a job he loved as a service technician for a

company called Technology Service Associates, which was later acquired by IBM. He drove to businesses and serviced their printers, cash registers, and computers. He had to stoop down to service computers and climb up to service satellite dishes. After the accident, IBM classified him as a qualified injured worker under the workers' compensation law.

At the time of trial in December 2001, Dr. Zoellner had not released Browne for vocational rehabilitation. He was waiting to see how helpful a rocker boot would be and whether more hand surgery would be needed.

Graham and Gary Nibbelink, a vocational rehabilitation consultant for Browne, disagreed about whether Browne would be able to find work after he completed his anticipated future medical treatment. According to Nibbelink, Browne's ankle and knee problems limit him to sedentary work. But almost all sedentary work requires bimanual upper extremity dexterity Browne is not going to be able to compete in the job market with people who have full use of both hands and arms.

According to Graham, most people who are motivated find a way to get back into the labor market in part because "most of us in our lives identify who we are by what we do." "So when you have that suddenly taken away, as Mr. Browne did in an accident, that is a very traumatic thing to deal with." It is detrimental to a person, disabled or not, to tell them they are not employable. Graham suggested several possible jobs for Browne, including insurance claims examiner, real estate appraiser, credit analyst, computer support specialist, or computer assisted drafting. Browne could get trained on adaptive devices to allow him to type one-handed.

D. Anticipated surgeries

Dr. Mann recommends that Browne's ankle be treated by fitting a molded brace and a rocker-bottom shoe, which will diminish the motion of his ankle. If it worked for Browne, it could buy him time before his ankle deteriorates to the point that he needs either an ankle fusion, which makes the bones grow together, or ankle replacement surgery. An ankle fusion would stress other joints. In Mann's opinion, Browne will need the ankle surgery eventually.

According to Dr. Zoellner, because of the interaction between the ankle and the knee, Browne's knee problems will get worse. Browne will need arthroscopy and a debridement of surplus tissue in the knee. It is likely he will need a knee replacement.

Dr. Hentz explained two or three further hand surgeries that would benefit Browne by restoring motion to his right thumb and sensation to his right hand. Even after all these surgeries, Browne's hand will never be normal.

CALCULATING DAMAGES FOR PAIN AND SUFFERING

On appeal defendants contend that the jury awarded excessive damages for pain and suffering after plaintiff's counsel invited them to apply an impermissible standard, the "golden rule."

Loth v. Truck-A-Way Corp. (1998) 60 Cal.App.4th 757 explained at page 764: "There is '[n]o definite standard or method of calculation . . . prescribed by law by which to fix reasonable compensation for pain and suffering.' (BAJI No. 14.13 (8th ed. 1994), original brackets omitted.) As our Supreme Court stated, 'One of the most difficult tasks imposed upon a jury in deciding a case involving personal injuries is to determine the amount of money the plaintiff is to be awarded as compensation for pain and suffering. No method is available to the jury by which it can objectively evaluate such damages, and no witness may express his subjective opinion on the matter. [Citation.] In a very real sense, the jury is asked to evaluate in terms of money a detriment for which monetary compensation cannot be ascertained with any demonstrable accuracy. As one writer on the subject has said, "Translating pain and anguish into dollars can, at best, be only an arbitrary allowance, and not a process of measurement, and consequently the judge can, in his instructions, give the jury no standard to go by; he can only tell them to allow such amount as in their discretion they may consider reasonable. . . . The chief reliance for reaching reasonable results in attempting to value suffering in terms of money must be the restraint and common sense of the jury. . .." (McCormick on Damages, § 88, pp. 318-319.)' (*Beagle v. Vasold* (1966) 65 Cal.2d 166, 172 [*Beagle*].)"

The jury here was instructed in terms of BAJI 14.13. "Reasonable compensation for any pain, discomfort, fear, anxiety, and other mental and emotional distress suffered

by the plaintiff and of which injury was a cause and for similar suffering reasonably certain to be experienced in the future from the same cause. [¶] No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for pain and suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. Further, the argument of counsel as to the amount of damages is not evidence of reasonable compensation. In making an award for pain and suffering you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in light of the evidence."

The jury was also instructed that noneconomic damages include pain, suffering, inconvenience, and emotional distress. (BAJI No. 14.01.)

In *Beagle*, the California Supreme Court established that one way for a jury to calculate an award of damages for pain and suffering is to assess an amount per day. "Under some circumstances, the concept of pain and suffering may become more meaningful when it is measured in short periods of time than over a span of many years, perhaps into infinity. The 'worth' of pain over a period of decades is often more difficult to grasp as a concept of reality than is the same experience limited to a day, a week or a month." (*Beagle*, *supra*, 65 Cal.2d at p. 181.) *Beagle* allowed plaintiffs' attorneys to make a "per diem" argument in support of a total award for pain and suffering. (*Id.* at p. 175.) The court also stated, "In holding that counsel may properly suggest to the jury that plaintiff's pain and suffering be measured on a 'per diem' basis, we do not imply that we also approve the so-called 'golden rule' argument, by which counsel asks the jurors to place themselves in the plaintiff's shoes and to award such damages as they would 'charge' to undergo equivalent pain and suffering." (*Id.* at p. 182, fn. 11.)

The vice of the "golden rule" argument is: "'The appeal to a juror to exercise his subjective judgment rather than an impartial judgment predicated on the evidence cannot be condoned. It tends to denigrate the jurors' oath to well and truly try the issue and render a true verdict according to the evidence. (Code Civ. Proc., § 604.) Moreover, it in effect asks each juror to become a personal partisan advocate for the injured party, rather than an unbiased and unprejudiced weigher of the evidence. Finally, it may tend to

induce each juror to consider a higher figure than he otherwise might to avoid being considered self-abasing.' (*Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 484-485; see also *Sabella v. Southern Pac. Co.* (1969) 70 Cal.2d 311, 319-320; *Zibbell v. Southern Pacific Co.* (1911) 160 Cal. 237, 255.)" (*Loth v. Truck-A-Way Corp.*, *supra*, 60 Cal.App.4th at p. 765.)

Within these broad limits, as summarized by *Westphal v. Wal-Mart Stores, Inc.* (1998) 68 Cal.App.4th 1071 at page 1078: "The amount of damages is a fact question, committed first to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial. (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1067; *Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 506 (*Seffert*).) All presumptions favor the trial court's ruling, which is entitled to great deference because the trial judge, having been present at trial, necessarily is more familiar with the evidence and is bound by the more demanding test of weighing conflicting evidence rather than our standard of review under the substantial evidence rule. (*Pool v. City of Oakland*, *supra*, at p. 1067; *Seffert v. Los Angeles Transit Lines*, *supra*, at p. 507; *Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1471.)

"We must uphold an award of damages whenever possible (*Seffert v. Los Angeles Transit Lines*, *supra*, 56 Cal.2d at p. 508) and 'can interfere on the ground that the judgment is excessive only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury.' (*Id.*, at p. 507; accord, *Scofield v. Critical Air Medicine*, Inc. (1996) 45 Cal.App.4th 990, 1012.)"

A. Counsel's argument

On appeal defendants claim that plaintiff's counsel repeatedly made a golden rule argument to the jury and that the trial court erred in overruling their single objection. Defendants point out the following parts of plaintiff's counsel's argument.

In opening argument, plaintiff's counsel asked the jury not to discount the loss of Browne's dreams. "What is the loss of your dreams worth? Now, you might tend to poo poo that somewhat, but I don't want you to. I ask you not to. Because, you know, part of

what makes up every one of us is our dreams, our hopes, our expectations. What we anticipate in life, what we look forward to, that's what keeps us plugging. Sometimes we couldn't get out of bed in the morning but for that. Because life is tough.

"And you know what? It's a great deal tougher if you're in Mark's position now than it is for any of the rest of us. Why? Because of what I discussed with Mr. Graham: When we are able bodied and we get out of bed in the morning with a spring in our step because we have got someplace to go to work, we have got something to look forward to, and we, we really feel productive, we're accomplishing something, that's our self-worth, that's what makes us particular. When we lose that, we lose part of what makes us whole, part of what makes us human. You can't discount that in this case, losing your dreams, losing what you have to look forward to.

"You're a young man, you are 42 years old. You have got young kids. You've got a job you love. You trained for it. It's your niche in life, it's the perfect spot for you, because you are good at it, you know how to do it, your employer's happy with you."

There was no objection to this part of the opening argument.

In describing Browne's future prospects, counsel asserted without objection that Browne faced further surgeries. "Talk about having a burr under your saddle for the rest of life with that to look forward to. I wouldn't like it to be me."

Counsel asserted without objection that his argument was not evidence of general damages. It was up to the jury to determine damages. "Pain is one of the things that we would do anything to avoid. We go to the dentist. He says, 'It will cost 65 bucks for this shot, but it wouldn't hurt.' Would any one of us think twice? Well, we don't, because we don't want pain."

In opening argument for assessing general noneconomic damages, counsel argued that Browne should receive $1,000 per each day of his 87 days in the hospital. After his release from the hospital, he should be compensated at his hourly rate for his last job, $22.50, for each hour of the 16 hours a day that he endures pain. "So that 22.50 an hour rate, should you choose to employ it, for 16 hours a day -- I mean, frankly, would anybody take that job for 22.50?"

Defense counsel stated, "Objection. It's the golden rule argument. I object to that argument." Plaintiff's counsel responded, "I'm not appealing to the jury, your Honor." The court stated: "Well, not directly anyways. [¶] Overruled."

Defense counsel argued to the jury that Browne's wages had nothing to do with his pain and suffering.

In closing argument, plaintiff's counsel responded without objection that "there has to be a measure of damages." Why not compare Browne's suffering to a job? "Again, if -- if he had to take this job and put up with what he has to put up with, he wouldn't take it, not for that rate, not for anybody's rate. Nobody would do it."

Counsel stated without objection, "You know, it's easy to say a life's not ruined when it isn't yours that's ruined."

Counsel stated without objection: "You know, there is a feeling, well, what do I care? It didn't happen to me. I don't believe you feel that, and I don't believe as the conscience of the community you're going to let that happen, because it wouldn't be right."

As indicated above, a "golden rule" argument asks jurors to put themselves in the plaintiff's shoes and determine how much they would charge to undergo the plaintiff's pain and suffering. (*Neumann v. Bishop*, *supra*, 59 Cal.App.3d 451, 483-484.) Examples of improper argument are: "'This life of independence is gone. What it would be worth to you?' He continued '. . . if you concern yourself with this pain and you could have a moving joint in your body that was constantly moving and every time you moved your major muscle it wouldn't move, what would you pay as an individual to free yourself from that pain, $5 a day, $10 a day? I wouldn't take $150 a day—$250 a day—so let's keep this in mind when you jurors sit down and discuss the plaintiff's case.'" (*Id.* at p. 484.) "'How would you like to sit in that chair for eight hours with a non-unionized femur for ten dollars a day? Would you do it?' . . . This reference passed without objection, as did a final appeal in which counsel stated, 'Someone comes up to you with a handful of diamonds and says, "This is worth $500,000.00." Would you take it and would being crippled for the rest of your life be worth it?'" (*Ibid.*)

"Generally a claim of misconduct is entitled to no consideration on appeal unless the record shows a timely and proper objection and a request that the jury be admonished." (*Horn v. Atchison T. & S. F. Ry. Co.* (1964) 61 Cal.2d 602, 610.) Defendants claim that the court's overruling of their objection made further objection futile. This does not explain why defense counsel failed to object to the three earlier argument passages of which they now complain.

Defendants objected once to plaintiff's counsel making a golden rule argument when counsel asked rhetorically whether anyone would take the job of Browne's suffering for $22.50 per hour. The court overruled the objection.

In later denying defendants' motion for new trial, the court stated, "I don't think that this is a situation where [plaintiff's counsel] was asking the jurors to put themselves in the plaintiff's shoes, so to speak, which is the very typical type of violation we find under this sort of golden rule argument." "I don't see [the golden rule] being violated in this initial statement. And I think when you look at his whole argument that he's really talking about the per diem. He's saying would somebody -- would anyone take that job for 22.50, not would any of you jurors put yourself in that place. I think he got close to the line but I don't think it directly -- it didn't cross that line to influence the jurors and was pulling on their emotional strings to the degree that it would be an abuse and misconduct on plaintiff's part."

Here, we believe that counsel's statements during argument are not likely to have affected the outcome. As *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298 explained at page 305: "'The ultimate determination of this issue rests upon this court's "view of the overall record, taking into account such factors, inter alia, as the nature and seriousness of the remarks and misconduct, the general atmosphere, including the judge's control, of the trial, the likelihood of prejudicing the jury, and the efficacy of objection or admonition under all the circumstances."' (*Simmons v. Southern Pac. Transportation Co.* (1976) 62 Cal.App.3d 341, 351, quoting from *Sabella v. Southern Pac. Co.* (1969) 70 Cal.2d 311, 321.) And, because of the trial court's unique ability to determine whether a verdict resulted in whole or in part from the alleged

misconduct, its decision to deny a motion for new trial should not be disturbed unless plainly wrong. (*Houser v. Bozwell* (1947) 80 Cal.App.2d 702, 707.)"

Had defendants successfully objected to the statements of counsel, the trial court would have repeated instructions the jury had already received: "You must not be influenced by sympathy, prejudice or passion." (BAJI No. 1.00.) They were instructed in terms of BAJI 14.13 (see *ante*, at p. 7): "the argument of counsel as to the amount of damages is not evidence of reasonable compensation. In making an award for pain and suffering you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in light of the evidence." Also, "You may not include as damages any amount that you might add for the purpose of punishing or making an example of the defendant for the public good . . . ." (BAJI 14.61.)

With one exception, defendants did not make a contemporaneous objection to what they now characterize as "golden rule" arguments by plaintiff's counsel. The trial judge who heard the statements in context concluded that the statements did not amount to misconduct. We agree with the trial court. Further, we determine that defendants were not prejudiced by counsel's statements during argument.

B. Amount of damages

Defendants recognize that an appellate court interferes with a jury award for pain and suffering only when the award is "'"so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice. . . ."' (*Cunningham v. Simpson* (1969) 1 Cal.3d 301, 308, 309, quoting from *Rosenberg v. J. C. Penney Co.* (1939) 30 Cal.App.2d 609, 628; see also *Roedder v. Lindsley* (1946) 28 Cal.2d 820, 823.)" (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 64 (*Bertero*).) *Roedder v. Lindsley*, *supra*, 28 Cal.2d 820 elaborated that "a verdict will not be disturbed by an appellate court unless it is so grossly disproportionate to any reasonable limit of compensation as shown by the evidence that it shocks one's sense of justice and raises a presumption that it is based on passion and prejudice rather than sober judgment." (*Id.* at p. 823.)

Early opinions by the California Supreme Court directed appellate courts to evaluate possible excessiveness by considering jury verdicts in similar cases. (*Maede v.*

Oakland High School Dist. (1931) 212 Cal. 419, 425; *Mudrick v. Market Street Ry. Co.* (1938) 11 Cal.2d 724, 735.) Later decisions by the California Supreme Court have focused on the facts and circumstances in the case under consideration. (*Crane v. Smith* (1943) 23 Cal.2d 288, 302; *Leming v. Oilfields Trucking Co.* (1955) 44 Cal.2d 343, 356; *Daggett v. Atchison, T. & S. F. Ry. Co.* (1957) 48 Cal.2d 655, 666.) For example, *Seffert* stated: "While the appellate court should consider the amounts awarded in prior cases for similar injuries, obviously, each case must be decided on its own facts and circumstances. Such examination demonstrates that such awards vary greatly. (See exhaustive annotations in 16 A.L.R.2d 3, and 16 A.L.R.2d 393.) Injuries are seldom identical and the amount of pain and suffering involved in similar physical injuries varies widely. These factors must be considered." (*Seffert*, *supra*, 56 Cal.2d at p. 508.)

Bertero stated: "Defendants have compiled a lengthy list of judgments awarding damages which have been reversed on appeal as excessive. Those cases do not, in and of themselves, mandate a reversal here. The vast variety of and disparity between awards in other cases demonstrate that injuries can seldom be measured on the same scale. The measure of damages suffered is a factual question and as such is a subject particularly within the province of the trier of fact. For a reviewing court to upset a jury's factual determination on the basis of what other juries awarded to other plaintiffs for other injuries in other cases based upon different evidence would constitute a serious invasion into the realm of factfinding. (*Seffert v. Los Angeles Transit Lines*, *supra*, 56 Cal.2d 498, 508; *Leming v. Oilfields Trucking Co.*, *supra*, 44 Cal.2d 343, 355-356.) Thus, we adhere to the previously announced and historically honored standard of reversing as excessive only those judgments which the entire record, when viewed most favorably to the judgment, indicates were rendered as the result of passion and prejudice on the part of the jurors." (*Bertero*, *supra*, 13 Cal.3d at p. 65, fn. 12.)

Plaintiff contends that these later cases embody the modern approach. Defendants point out that the more recent cases do not expressly overrule the earlier ones. Defendants contend that a comparison with similar cases establishes that any award over $871,080.13 is unreasonable as a matter of law. Defendants ask us to perform a

comparative review of awards for pain and suffering in order to establish a range of values for similar injuries. However, the cases cited do not involve a combination of injuries to a hand and leg. (*Johnston v. Long* (1947) 30 Cal.2d 54, 58 [garage door cut off part of plaintiff's nose]; *Huggans v. Southern Pacific Co.* (1949) 92 Cal.App.2d 599, 601 [train-pedestrian accident caused loss of major portion of right foot and left leg below the knee]; *McNulty v. Southern Pacific Co.* (1950) 96 Cal.App.2d 841, 846 [train-pedestrian accident caused loss of one leg above the knee and the other leg below the knee]; *Harris v. Lampert* (1955) 131 Cal.App.2d 751, 753-754 [vehicle accident caused skull fracture, lacerated eardrum, bone chip in left foot]; *Seffert*, *supra*, 56 Cal.2d 498, 504 [bus accident caused fractures of left heel and shin bones, severed nerves and arteries to left foot and persistent open ulcer]; *Honea v. Matson Navigation Co.* (1972 N.D. Cal.) 336 F.Supp. 793, 799 [slip and fall resulted in fractured left hip].)[1]

The vehicle collision in *Randolph v. Budget Rent-a-Car* (1995 C.D.Cal.) 878 F.Supp. 162 (reversed on other grounds by *Randolph v. Budget Rent-a-Car* (9th Cir. 1996) 97 F.3d 319) caused a fractured pelvis, fractured metacarpals on the left hand, and a fractured tibial plateau. (*Randolph v. Budget Rent-a-Car*, *supra*, 878 F.Supp. at pp. 164-165.) However, the trial court's main concern was the amount of damages for traumatic sexual dysfunction, an injury not present here. (*Id.* at pp. 165-166.)

Here, in the absence of any published case involving a similar combination of injuries, we consider whether the award of $2 million for pain and suffering is supported by the facts and circumstances of the case before us or whether the award resulted from passion and prejudice.

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[1] Defendant's motion for new trial presented the trial court with evidence of two jury verdicts. One, from 2000, awarded $250,000 in noneconomic damages where a vehicle collision caused multiple fractures to one leg. The other, from 1998, awarded $43,917 in noneconomic damages when a shredding machine caused the traumatic amputation of four fingers of the dominant hand.

Without repeating all the injuries detailed above, we observe that Browne reported constant right knee and ankle pain, which is exacerbated by walking and exercise. The doctors explained that both joints exhibit arthritic degeneration that was accelerated by the accident. Browne has little feeling in his right hand. His right thumb is nonfunctional. His right hand is unsightly and barely functions. It frightens his younger daughter.

The jury was instructed that the average life expectancy for a 44-year-old male, Browne's age at the time of the December 2001 trial, was 33.2 additional years. The accident occurred two years before trial. More surgeries might improve the function and appearance of Browne's right hand, but it will never be normal. It is likely that both his right ankle and knee will have to be replaced due to their continued degeneration.

Browne is unable to return to the job he loved. It is questionable whether he will ever be gainfully employed again. Plaintiff's counsel asked for a future earnings loss of $1,048,659. Defense counsel argued it was only $106,751. The jury awarded $701,719.

Plaintiff's counsel asked for noneconomic damages of $2,365,200. Defense counsel argued $650,000 was enough. The jury awarded $2,000,000.

Considering that Browne may continue to endure pain, suffering, inconvenience, and emotional distress for 35.2 years or 12,848 days from the date of the accident, the jury awarded Browne slightly less than $156 per day for the remainder of his life.

The trial judge denied a new trial on the basis of excessive noneconomic damages, stating: "I don't think that there is any particular case we can use as a scale for this. In other words, we could have another similar type of accident, maybe it occurred in a different jurisdiction, and jurors may come to a different opinion as to what general damages should be awarded. It's difficult to put a finger on it, but I think that the evidence in this case is sufficient to support the verdict, and that it was reasonable, taking into account the injuries and also in looking at the special damages or economic damages in this case that were determined by the jury as well."

As we have observed before, "The trial judge, who also heard the evidence, refused to grant a new trial on the ground that this award was excessive. We find no

abuse of discretion in this ruling." (*Ortega v. Pajaro Valley Unified School Dist.* (1998) 64 Cal.App.4th 1023, 1061.) We are not persuaded that the award of $2,000,000 for pain and suffering is so grossly disproportionate as to have resulted from the jury's passion and prejudice. On the facts and circumstances before us, the award does not shock our conscience. (*Damele v. Mack Trucks, Inc.* (1990) 219 Cal.App.3d 29, 38.)

DISPOSITION

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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PREMO, ACTING P.J.

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ELIA, J.